TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~335~~. 165

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,

vs.

JOHN F. WILEY ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF VIRGINIA.

FILED DECEMBER 7, 1869.

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No. 333.

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1 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judges of the circuit court of the United States for the district of Virginia, greeting:

Because, in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court before you, between the United States of America and John F. Wiley et al., a manifest error hath happened to the great damage of the said United States of America, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 1st Monday of December next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 13th day of May, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] W. H. BARRY,
Clerk of the Circuit Court of the United States for the District of Virginia.

2 (Indorsed:) No. . United States circuit court, district of Virginia. The United States of America, pl'ff in error, vs. John F. Wiley et al., def'ts in error. Writ of error to the U. S. circuit court, district of Virginia.

Filed May 13th, 1869.

W. H. BARRY, *Clerk.*

3 The President of the United States, to wit, to John F. Wiley, Lewis E. Harvie, Peter F. Boisseau, William Old, & John B. Harvie, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington on the 1st Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Virginia, wherein the United States are plaintiffs and John F. Wiley, Lewis E. Harvie, Peter F. Boisseau, William Old, & John B. Harvie are defendants in error, to show cause, if any there be, why the judgment, in said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 13th day of May, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] JOHN C. UNDERWOOD,
Dist. Judge.

4 (Indorsed:) No. . United States court, district of Virginia. United States of America vs. John F. Wiley et al. Citation.

Filed Oct. 15th, 1869.

W. H. BARRY, *Clerk.*

UNITED STATES OF AMERICA,
District of Virginia, to wit:

John W. Farrell, deputy marshal, being duly sworn, on oath deposeth and saith that, on the 12th day of October, A. D. 1869, he duly served on Jno. F. Wiley, Lewis E. Harvie, & Peter F. Boisseaux, and on the 13th Oct., 1869, on W'm Old & Jno. B. Harvie, defendants in error, the within writ, (or citation,) by reading the same to and leaving a true copy thereof with each of them.

JOHN W. FARRELL,
Deputy Marshal.

Sworn and subscribed to before me this 15th day of October, A. D. 1869.

W. H. BARRY,
Clerk U.S. Cir. C't, Dist. Va.

5 At a regular term of the circuit court of the United States for the district of Virginia, held at the court-room in the custom-house, in the city of Richmond, in said district, on the 1st Monday of May, in the year of our Lord one thousand eight hundred and sixty-nine, and continued to this 13th day of May, A. D. 1869:

Present, Hon. Salmon P. Chase, Chief Justice U. S., presiding; Hon. John C. Underwood, district judge, associate.

6 *Summons.*

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
District of Virginia, ss:

The President of the United States of America to the marshal of the district of V'a, greeting:

We command you that you summon John F. Wiley, Lewis E. Harvie, Peter F. Boisseau, William Old, and John B. Harvie, if they shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the district of Virginia, at rules, to be holden at the said clerk's office, in the custom-house, in the city of Richmond, in the district aforesaid, on the 1st Monday of March next, to answer unto the United States of America in a plea of debt for $20,000, to its damage, as it alleges, of $20,000 [dollars;] and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 15th day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the 93d year.

[L. S.] W. H. BARRY, *Clerk.*

U. S. MARSHAL'S OFFICE,
Richmond, V'a, Feb'y 23d, 1869.

7 I hereby depute the sheriff of Amelia County, or his deputy, as a special deputy to execute this writ and make return in due form.

CH'S VAN WINKEL,
U. S. Marshal.

Executed on Jno. F. Wiley, P. F. Boisseau, & L. E. Harvie.
THOMAS S. SCOTT, *D. S.*,
For Jno. H. Haskins, S. A. C.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
District of Virginia, ss:

The President of the United States of America to the marshal of the district of V'a, greeting:

We command you that you summon John F. Wiley, Lewis E. Harvie, Peter F. Boisseau, William Old, and John B. Harvie, if they shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the district of Virginia, at rules, to be holden at the said clerk's office, in the custom-house, in the city of Richmond, in the district aforesaid, on the 1st Monday of March next, to answer unto the United States of America, on a plea of debt, $20,000, to its damage, as it alleges, of $20,000 [dollars,] and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Su-
8 preme Court of the United States of America, at Richmond, this 15th day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the 93d year.

[L. S.] W. H. BARRY, *Clerk.*

U. S. MARSHAL'S OFFICE,
Richmond, V'a, February 23, 1869.

I hereby depute the sheriff of Powhatan County, or his deputy, as a special deputy to execute this writ, and make return in due form.

CH'S VAN WINKEL,
U. S. Marshal.

Executed this 1st day of March, 1869, by delivering to J. B. Harvie & W'm Old, the within-named defendants, in person, a true copy of this writ.

J. B. GOODE, *Sh'ff Pow'n,*
Special Deputy Marshal for Cha's Van Winkel, U. S. Marshal.

9 *Declaration.*

In the circuit court of the United States for the district of Virginia rules, 18

The United States of American complain of John F. Wiley, Lewis E. Harvie, Peter F. Boisseau, William Old, & John B. Harvie, defendants, who have been duly summoned of a plea that they render to the plaintiff the sum of twenty thousand dollars, which the defendants owe to and unjustly detain from the plaintiffs: For that heretofore, to wit, on the 7th day of April, in the year of our Lord one thousand eight hundred and fifty-eight, in the district of Virginia, the said defendants, by their certain writing obligatory, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiffs in the just and full sum of twenty thousand dollars, and for the payment thereof they bound themselves, their heirs, executors, and administrators, jointly and severally, firmly by their writing obligatory aforesaid; to which writing obligatory there was and is annexed a certain condition, to the effect and purport following, to wit:

"Whereas the President of the United States hath, pursuant to law, appointed the said John F. Wiley to be marshal of the United States

for the eastern district of Virginia, to have and to hold the same,
10 with all the rights, privileges, and emoluments thereunto lawfully appertaining, for four years from the 30th day of March, 1858, unless sooner removed therefrom, as by a commission to him bearing date the 30th day of March, 1858, more fully appears: Now, if the said John F. Wiley, by himself & by his deputies, shall faithfully perform all the duties of said office of marshal, then this obligation to be void; otherwise to remain in full force and virtue."

And the plaintiffs say that the said John F. Wiley did not faithfully perform all the duties of the said office of marshal, but failed to perform the same in this, to wit, in that the said John F. Wiley, on the day of , 1860, had in his hands the sum of fourteen thousand three hundred & sixty-seven ($\frac{66}{100}$) dollars, ($14,367 66,) being funds advanced to the said Wiley as marshal as aforesaid by the said plaintiff, to enable the said Wiley to execute his duties as marshal, and that the said Wiley has wholly failed to account with the plaintiff for the said monies so advanced as aforesaid.

By means of all which premises the plaintiffs have been greatly injured and damaged, and an action has accrued to the plaintiff to demand & have of or from the defendants the said sum of twenty thousand dollars above demanded; yet the defendants, though often requested, have not paid the whole or any part of the said sum, but so to do have and each of them hath hithereto wholly neglected and
11 refused, and still refuse, to the damage of the plaintiff, $20,000; and therefore they bring suit, &c.

S. FERGUSON BEACH,
U. S. Dist. Att'y.

1869, March rules.—Declaration filed & com. order.
" 1st April rules.—Com. order cont'd & W. E.
(The bond within declared on not filed with the papers in the case.)

12 And at another day, to wit:

At rules held at the clerk's office of said circuit court of the United States, on Monday, the 1st day of March, A. D. 1869—

Whereupon the defendants, being duly summoned, and not appearing, on motion of the plaintiff, by its attorney, it was ordered that judgment be entered for the plaintiff against the defendants for the debt and interest in the declaration mentioned, unless the said defendants should appear and plead the issue at the then next rules.

And at another day, to wit:

At rules held in the clerk's office of the said circuit court of the United States, on Monday, the 5th day of April, A. D. 1869—

Come the plaintiffs by their attorney, whereupon the defendants still failing to appear, therefore it was ordered that judgment be entered for the plaintiffs against the defendants for the debt on the declaration mentioned, and the costs; but the said judgment was to be discharged by the payment of such damages as the plaintiff had sustained by occasion of the defendants' breach of the conditions of the writing obligatory in the declaration mentioned, assigned by the plaintiff, and the costs, which damages were to be enquired of by a jury at the then next term.

13 *Plea of statute of limitations.*

UNITED STATES
v.
JOHN F. WILEY.

And the John F. Wiley, by his attorney, comes and defends the wrong and injury when, &c., and says that the said plaintiff ought not to have or maintain the aforesaid action against him, the said defendant, because he says that the said several supposed causes of action in the said declaration mentioned, did not, nor did either of them or any of them, accrue to the said plaintiff at any time within six years before the commencement of this suit in manner and form as the said plaintiff above hereof has complained against him, and this he, the said defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have and maintain his aforesaid action thereof against him, &c.

Filed May 13, 1869.

W. H. BARRY, *Clerk.*

Replication.

To the within pleas the plaintiffs reply generally, with leave to offer in evidence any matter or matters which might have been replied specially.

S. FERGUSON BEACH.

14 *Plea—covenant performed.*

J. F. WILEY
ats.
UNITED STATES OF AMERICA.

And the said J. F. Wiley, for further plea, says that he, the said John F. Wiley, did from time to time, and at all times after the making of said writing obligatory, well and truly observe, perform, fulfil, and keep all and singular the articles, clauses, conditions, and agreements in the said condition of said writing specified, comprised, or mentioned, and this he is ready to verify. Wherefore he prays judgment, &c.

Filed May 13, 1869,

W. H. BARRY, *Clerk.*

Plea—payments.

J. F. WILEY
ats.
UNITED STATES OF AMERICA.

And the said J. F. Wiley, for further plea, says that, before the commencement of this suit, to wit, on the day of , at &c., and on divers other days & times between that day and the day of the commencement of this suit, &c., the said defendant paid to said plaintiff the said several sums of money in the said declaration mentioned, and this he is ready to verify. Wherefore he prays judgment, &c.

Filed May 13, 1869.

W. H. BARRY, *Clerk.*

15 *Stipulation.*

In U. S. circuit court, dist. Va.

UNITED STATES
vs.
JOHN F. WILEY.

It is agreed between the parties to this cause that, under the general replication of the plaintiffs to the defendants' plea of the act of limitation, the plaintiffs may offer in evidence any and all matters which might have been replied specially with the same effect as if replied specially.

And it is further agreed that, from the 24th day of May, 1861, to the 24th day of May, 1865, the defendants were actual residents of the State of Virginia, and that, during the whole of that period, by reason of resistance to the execution of the laws of the United States and the interruption of the ordinary course of judicial proceedings in said State of Virginia, said defendants could not be served with process for the commencement of said action.

It is further agreed that the plaintiffs' cause of action arose on the day of , 1860.

All matters arising on the issue joined upon the plea of limitations are submitted to the court, a jury being waived. Should the judgment of the court on the plea of limitations be for the plaintiff, the defendant is to have the benefit of his other pleas filed in the cause, and of such additional pleas as he may hereafter be advised it is material for him to file.

S. F. BEACH, *for the U. S.*
JAMES D. HALYBURTON,
JNO. M. GREGORY, *for Defendants.*

Filed May 13, 1869.

W. H. BARRY, *Clerk.*

16 *Judgment.*

At a regular term of the circuit court of the United States for the district of Virginia, held at the court-room in the custom-house, in the city of Richmond, in said district, on the 1st Monday of May, in the year of our Lord one thousand eight hundred and sixty-nine, and continued to this 13th day of May, A. D. 1869:

Present, Hon. Salmon P. Chase, Chief Justice U. S., presiding; Hon. John C. Underwood, district judge, associate.

UNITED STATES OF AMERICA, PL'FF,
vs.
JOHN F. WILEY, LATE U. S. MARSHAL DISTRICT of Va., and sureties, def't.
No. 329.—In debt.

This day came the parties by their attorneys, and thereupon the defendants plead payment of the debt and interest in the plaintiffs' declaration mentioned, and of this they put themselves upon the country; and the plaintiffs likewise. And for further plea in this behalf the defendants, by their counsel, filed their plea of the statute of limitations as a bar to this action, to which the plaintiffs replied generally. And by agreement of parties, as per stipulation in writing filed, it is agreed to

waive their right to a jury for the trial of this cause, and that the whole matter of law and fact may be heard and determined by the court. Whereupon the evidence and arguments of counsel being fully heard, and the court, having considered of its judgment to be given in the premises, is of opinion that the statute of limitations, as set forth in the defendants' plea filed, is a complete bar to this action, and that the plaintiffs cannot recover herein. It is, therefore, ordered that the suit be dismissed.

To which decision of the court thus given the district attorney excepts and prays that the facts may be certified of record and a writ of error allowed him to the Supreme Court of the United States; which is accordingly done.

17 *Certificate & order.*

In U. S. circuit court, dist Va., spring term, 1869.

UNITED STATES }
vs. }
JOHN F. WILEY. }

In this cause the court certifies and orders it to be made a part of the record that the facts stated in the stipulation, signed by counsel, & heretofore filed, were all the facts proved on the trial of the issue joined in the defendants' plea of act of limitations mentioned in said stipulation.

Filed May 15, 1869.

W. H. BARRY, *Clerk.*

18 *Clerk's certificate.*

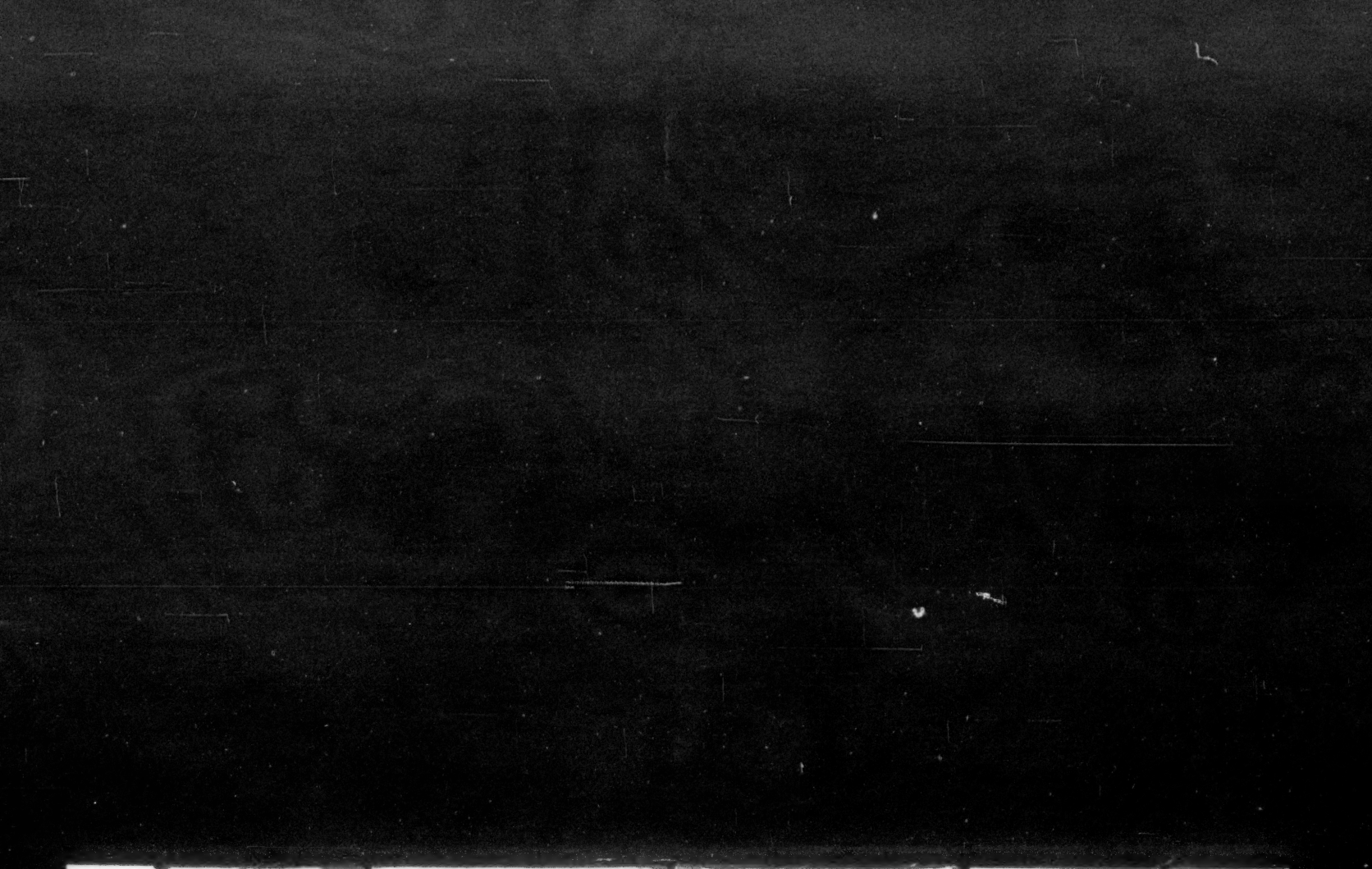
UNITED STATES OF AMERICA,
Circuit Court of the United States,
District of Virginia, Clerk's Office, ss:

I, William H. Barry, clerk of the circuit court of the United States for the district of Virginia, do hereby certify that the foregoing contains a true and perfect transcript of the record, process, and proceedings in a cause determined in said court wherein the United States are plaintiffs in error, and John F. Wiley et al. are defendants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 16th day of October, in the year of our Lord one thousand eight hundred and sixty-nine.

[SEAL.] W. H. BARRY, *Clerk.*

(Indorsement on cover:) No. 333. The United States of America, plaintiffs in error, vs. John F. Wiley et al. Virginia C. C. U. S.
Filed 7th December, 1869.



In the Supreme Court of the United States.

DECEMBER TERM, 1870.

THE UNITED STATES, *Plaintiff in Error*,
vs.
JOHN F. WILEY, *et al.*
} No. 133.

In Error to the Circuit Court of the United States for the District of Virginia.

BRIEF FOR THE UNITED STATES.

This is an action of debt upon the bond given by Wiley as principal, and the other defendants as sureties, for the faithful performance of Wiley's duties as marshal of the United States. The suit was begun on the 15th of February, 1869. Plea, the statute of limitations.

In the circuit court it was agreed that the cause of action arose in 1860, and that "from the 24th day of May, 1861, to the 24th day of May, 1865, the defendants were actual residents of the State of Virginia, and that, during the whole of that period, by reason of resistance to the execution of the laws of the United States, and the interruption of the ordinary course of judicial proceedings in said State of Virginia, said defendants could not be served with process for the commencement of said action."

2 Stat 374

Upon these facts judgment was given to the defendant, and this writ of error was brought.

This case would seem to be one fully covered by former decisions of this court, to the effect that the time during which the courts in the lately rebellious States were closed to the opposing belligerents, is to be excluded from the computation of time fixed by the statute of limitations within which suits must be brought. There would seem to be no reason, if the statute of limitations runs against the United States at all, why this exclusion should not be made in respect of suits brought by them as well as suits brought by their citizens.

~~Statute of March 3, 1863, § 7, 12 Stats. at Large, 757.~~

Statute of June 11, 1864, § 1, 13 Stats. at Large, 123.

Hanger *vs.* Abbott, 6 Wallace, 532.

The Protector, 9 Wallace, 687.

A. T. AKERMAN,
Attorney General.

C. H. HILL,
Asst. Attorney General.

THE SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES
v.
JOHN F. WILY. } *Brief for the Appellee.*

This is a suit by the United States against John F. Wily, formerly marshal of the Eastern District of Virginia, upon his official bond. The defendant pleaded several pleas; one of which was the act of limitations of the 10th of April, 1806, 2 Statutes at Large, 374; the 4th section of which provides, that "such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the right of action shall have accrued; saving, nevertheless, the rights of infants, feme coverts, and persons non compos mentis, so that they sue within three years after their disabilities are removed."

Issues were joined upon these pleas, and it was agreed, at the trial, *as appears by the record*, that *the issue upon the act of limitations* should be submitted to the court, and that, if the decision should be against the defendant on that plea, the other issues should be tried by a jury; and leave was reserved to *file additional pleas.*

The record states, in one part of it, that the parties agreed that "the whole matter of law and fact may be heard and determined by the court;" but the agreement, which forms a part of the record, shows exactly what was agreed upon, and states that "all matters upon the issue joined upon the statute of limitations are submitted to the court;" and the record further states, that the evidence and the arguments being fully heard, "the court is of opinion, that the statute of limitations is a complete bar, and the plaintiffs cannot recover."

No mention is made, by the court, of the other plea, so that it is obvious, from the whole record, taken together, that the issue upon the plea of the statute was alone submitted, and alone decided;

and that, if the judgment of the court should be reversed, the cause must be sent back for further proceedings.

It was agreed, "that the cause of action arose on the day of , 1860;" and it appears that the suit was instituted in February, 1869; so that more than six years elapsed, after the cause of action arose, before the suit was commenced.

It appears, however, that, from the 24th of May, 1861, to the 24th of May, 1865, process could not be served, in consequence of resistance to the execution of the laws of the United States, and the interruption of judicial proceedings;" and the plaintiff maintained that, according to the decision of the supreme court, in the case of Hanger v. Abbott, the period of four years last mentioned should be deducted from the time which had elapsed since the cause of action arose; and, in that case, the six years required by the statute to bar the action would not have expired.

The defendant, in reply to the argument of the plaintiff, insists, that the decision in the case of Hanger v. Abbott, 6 Wallace, 532, has no application to the case now before the court. That was a decision in relation to the construction of a state law; a statute of limitations of the state of Arkansas; the case, now before this court, depends upon the construction of a statute, or rather of two statutes of the Congress of the United States, and, in this respect, materially differs from the case of Abbott and Hanger.

On the 11th of June, 1864 (see Statutes at Large, vol. 13, p. 123), it was enacted by Congress, "That whenever, during the existence of the present rebellion, any action, civil or criminal, *shall accrue* against any person, who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of said action, or the arrest of such person; or whenever, after such action *shall have accrued*, such person *cannot, by* reason of such resistance to the execution of the laws of the United States, or such interruption of the ordinary course of judicial proceedings, *be arrested, or served with process* for the commencement of the action, the time during which such person *shall so be* beyond the reach of legal process, shall not be deemed or taken as any part of the time limited by law for the commencement of the action."

This statute is plainly prospective in its operation, in both of its branches. With respect to those actions, which, in the language of the act, "shall accrue," there can be no need of argument or com-

ment. To me it seems equally clear, that in relation to actions, which *shall have accrued*, it is prospective to this extent, that although it applies to past transactions, that is to say, to causes of action which had accrued before its passage, still, even in those cases, it deducts from the time which may have elapsed since the cause of action arose, only so much of the time of the rebellion, or of the period when process could not be served, as elapsed *after* the passage of the act. This appears plain, from the use of the phrases, "cannot be," and "shall so be." The act does not use the words, "*cannot have been*," but "cannot *be*." It does not say, "shall *so have been*," but who "shall *so be*" beyond the reach of legal process. Both these expressions are obviously prospective, and can only mean, as I understand them, that if, *after the passage of the act*, any person cannot be arrested, then the time, *after the passage of the act*, during which process is obstructed, shall be deducted, in computing the time within which the action may be, or might have been, brought. I cannot see how it is possible to put any other construction upon the statute; and all that remains to be considered is the effect of that interpretation of it.

If Congress has said plainly that *so much* of the time of the rebellion, or civil war, as elapsed after the passage of the act aforesaid, shall not be computed, and has said no more in express terms, is it not fully equivalent to saying that the residue of the period of the war shall be computed in applying the act of limitations? Is not this a case, if there ever was or can be one, for the application of the old rule of construction, "expressio unius est exclusio alterius?"

The Congress had the whole period of the war present to its mind; in its contemplation. It could not have considered a part of that period, without considering the whole of it. It could not have omitted to provide for any part of that period, because it was not in its memory. Can it be doubted, then, that its omission to say anything in relation to one part of that time of confusion, when it excluded another part of it from computation, conveys its meaning, that the part of that period of which no mention is made, shall not be excluded, almost or quite as clearly as if had said so in express words?

We are not now asking your honors to decide this case upon the ground that it is within the equity of any statute; that is to say, upon the ground that, although it is not provided for by any statute, yet it is within the equity of the statute, and stands upon the same

reason with other cases that have been provided for. This is what the learned counsel on the other side will have to do, if he should ask you to engraft upon the statute of limitations an exception, not contained in it, of the whole period of the civil war; a mode of construing statutes, which, we submit, should never be resorted to without extreme caution, and which has probably led much oftener to a breach of the law than to its observance.

What we most respectfully ask your honors to do is not this, but to consider the plain language of an act of Congress, and to carry out *the intent of the law*, as *gathered from that language*. We insist, therefore, that, even if the act of limitations of 1806 ought, in the absence of all other legislation on the subject, to have been construed in the same way that the statute of Arkansas was by the court in Hanger and Abbott; still, the act of June 11th, 1864, to which we have referred, has changed the law.

The construction of this law is now, we believe, to be settled by your honors for the first time. It is, so far as we know, entirely res nova; which the supreme court, in the case above mentioned, purposely forbore to touch; so that your honors are now at liberty, unfettered by judicial decisions, to put upon the statute the interpretation you may deem most reasonable.

CONWAY ROBINSON,
For HALYBURTON & ~~ROBINSON~~,
Jezewell Taylor Counsel, &c.

If we are wrong in supposing, that the decision of the Court, in Hanger and Abbott, can not affect this case; then, unless the question decided in that case, is regarded by your honours as entirely closed by that decision, so that no further argument will be heard upon it, we most respectfully ask leave to make a very few brief comments upon the authorities referred to in that case; and to add to them one or two more, which seem to us to have a very important bearing upon the case now before you.

It seems to be a well settled rule of construction in England, that the courts will not engraft exceptions upon a general statute of limitations, merely because they stand upon as strong grounds of reason, or upon the same grounds as the exceptions, which may have been introduced into it; or because it may be thought unjust or unreasonable, that the statute should not contain them. In favour of this rule, the current of authorities in England is strong, and we believe unbroken. In addition to the cases referred to in Hanger and Abbott, we beg leave to cite "the great case," as it is called by Sir William Grant, of Stowel v. Lord Zonche, Plowden 353, 369; and Beckford v. Wade 17, Vesey 88. We rely especially upon the latter case, because it appears to have been decided upon great consideration, and after a full review of most of the leading authorities upon the subject, by one of the most eminent judges, and one of the ablest and soundest reasoners, that ever sat in the English court of chancery.

Lord Brougham says, in his sketch of the life of Sir William Grant, "We have now named, in some respect, the most extraordinary individual of his time; one certainly than whom none ever better sustained the judicial office; though its functions were administered by him upon a somewhat contracted scale; one, than whom none ever descended from the forum into the Senate with more extraordinary powers of argumentation, or flourished there with greater renown." The case of Beckford v. Wade, is certainly a very different case from the one now before the court, but in that case, as we have said, the master of the rolls inquires at considerable length into the reasonableness of the rule to which we have re-

ferred, and reviews some of the most respectable and weighty authorities by which it is established. His opinion seems to be strongly and decidedly in favour of the rule, and he refers to the cases of Lord Buckinghamshire v. Drury, Wilmot 177, and Stowel v. Lord Zonche, Plowden 369; to show that infants and married women would have been bound by general statutes of limitations, unless they had been expressly excepted out of them. He further states, that absent defendants had the benefit of the statute of limitations, until a statute was passed in the reign of Queen Anne to prevent them from taking advantage of it. Surely there could not be in any case stronger reasons for excepting it from the statute, than in the case of a plaintiff who could not sue, because the debtor had absconded or chose to be out of the realm. Yet all attempts to introduce such an exception *had failed*, until the Legislature was obliged to interfere. He refers also to the cases of Hall v. Wybourne, 2 Salkeld 420; and Aubrey v. Fortesine, 10 Modern Reports 206, with apparent approval; in which the opinion had been expressed, that even if the courts were shut up in time of war, *so that no original could be served*, the statute of limitation would continue to run, and certainly no cases can stand upon stronger grounds than some of the cases mentioned above, in which the courts constantly refused to make any exception.

With respect to Lechford's case, 8 Rep's 99, and certain passages in Coke upon Littleton, in which Lord Coke is speaking, *not of the interpretation of statutes*, but of bars and forfeitures at the common law, among which he mentions *a descent after a disseisin*, Sir William Grant remarks, that although infants and persons of nonsane memory, and persons beyond seas, were not affected by those bars, yet that these modifications of the rule were coeval with it, and *formed a part of it;* that the rule never existed except as accompanied with its exception; and that both stood upon the same common law authority.

In those cases mentioned by Sir William Grant, there was no previously existing rule, even of the common law, to which exceptions were afterwards introduced by the courts, but the rule was a modified rule from the beginning.

There is a class of cases which seem at first view to resemble the case before the court; but which, upon a closer inspection, are seen, as we think, to be entirely different from it.

It may be true that when one nation declares war against another, the creditors of the nation declaring war, or of persons who form a

part of that nation, which creditors are citizens of the country against which war is declared, are exempted during the war from the operation of the statute of limitations of the other belligerent country; but if this be so, it is not, we apprehend, because an exception is in such cases introduced into the statute. It is because the statute is regarded by the courts as modified and suspended for a time, by the act of the nation declaring war against the other. It would seem to be unreasonable and incongruous and absurd, for one nation to say to another, we declare war against you. We do not confiscate the debts due to your citizens, from citizens of our country. You may recover them after the war is over. You shall not however sue for them while the war lasts. Our courts shall be closed against you during that period; at the same time, though we prohibit you from bringing any suit, and close our courts against you, the act of limitations shall continue to run, and if the war lasts until the time allowed for commencing an action has expired, you will lose your remedy entirely.

For this reason it may be reasonable and proper when one nation declares war against another, not that the courts of th[illegible]country so declaring war should introduce an exception into t[illegible]s limitations not contained in it, but should continue th[illegible]e of war, or the act of making war, as of itself a decl[illegible]- country so making war, that its own acts of limitation shall be suspended during the war; so as to work no wrong or injustice to those persons, who are hindered and forbidden by the war to bring suit. In these cases the statute declaring war, or *the declaration of war*, or the *act of making war*, is construed by the courts, or may, perhaps, be construed by them, as equivalent to a statute or legislative declaration that the acts of limitation of the war-making country should be suspended.

In the case before us, there was no statute or act of congress, or act of the government during the civil war, which could possibly be construed as a repeal or temporary suspension of the acts of limitation of the United States; so far at least as the government of the United States was concerned. There was never a suspension for a single moment, of the *right* of the United States to sue; no *act of the government* which was intended to prevent it from commencing an action; on the contrary, it claimed *the right* to bring a suit against its debtors at any time and at all times during the war, and was only prevented from exercising *that right* by forcible resistance to the laws. The civil war, then, was not a suspension by the

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For this reason it may be reasonable and proper when one nation declares war against another, not that the courts of the country so declaring war should introduce an exception into the statute of limitations not contained in it, but should continue the declaration of war, or the act of making war, as of itself a declaration by the country so making war, that its own acts of limitation shall be suspended during the war; so as to work no wrong or injustice to those persons, who are hindered and forbidden by the war to bring suit. In these cases the statute declaring war, or *the declaration of war*, or the *act of making war*, is construed by the courts, or may, perhaps, be construed by them, as equivalent to a statute or legislative declaration that the acts of limitation of the war-making country should be suspended.

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government of the United States of its own acts of limitations, or of its own right to sue.

In our own country, the rule of construction which, as we endeavoured to show, is established in England, seems to have been repeatedly recognized as the true rule by some of the highest courts of the country; among them the supreme court of the United States, the highest of all.

In the case of Ruggles v. Keeler, 3 Johnson's Reports 265, Chancellor Kent, in delivering the opinion of the court says, with reference to the New York statute of limitations, "the act required that all actions founded upon any contract without speciality, shall be brought within six years next after the cause of action accrued. These words would, *undoubtedly*, unless controlled by the exception in the statute, apply even to the case of foreigners, and to causes of action arising abroad."

The cases of M'Iver v. Ragan, 2 Wheaton 29, and Alabama v. Dalton 9 Howard 522, are both, as we understand them, to the same effect. The case of Alabama v. Dalton, was a very strong one in favour of making an exception, but the Judge who pronounced the opinion of the court, said "the legislature having made no exception, the courts can make none, as this would be legislating."

In M'Iver v. Ragan, Chief Justice Marshal said, in delivering the opinion of the court, "Whenever the situation of the party was such, as in the opinion of the legislature to furnish a motive for excepting him from the operation of the law, the legislature has made the exception. It would be going far for this court to add to those exceptions."

It is true that the Chief Justice, in that case, made a remark, which may be understood as the expression of an opinion, that when the courts of a country are closed by war, the acts of limitations are suspended *in all cases*. If the Chief Justice meant to express that opinion, it was obiter dictum, and without citing any authority or stating his reasons for it, and would seem to be inconsistent with the principle he had before laid down; and could hardly be allowed, we presume, and we say it with the highest respect and deference for the opinions of that great jurist, (clarum et venerabile nomen) to outweigh, under the circumstances under which it was uttered the numerous and high authorities to which reference has been made. It is by no means clear, however, that Judge Marshall intended to express any such opinion. It was not at all necessary, nor of the least importance to his argument, to have given any

opinion at all on that point. It was quite sufficient for his purpose to show, as he did, that admitting the law to be, as counsel had maintained that it was, when the courts were shut up in time of war, still there was a wide distinction between the case put by counsel, as it seems arguendo, and the case he was deciding; and this we believe was all he meant to do. If, however, the Chief Justice intended to state it as his opinion that the shutting up of the courts in time of war, would be an answer to the plea of the statute of limitations, we have very little doubt that he was speaking of alien enemies, against whom the courts are closed in time of war, but to whom they are opened when peace returns; and who, according to some decisions, made by some of our courts, are not affected by the statute while the war continues. This appears from the language used by him. He says, "It is admitted that the case of the plaintiffs is not within them, (the exceptions contained in the statute), but it *is contended* to be within the same equity with those which *have been taken out of* the statute; as where the courts of a country *are closed*, so that no suits can be instituted."

Now, when he speaks of those cases "which *have been* taken out of the statute," he may only mean to say, "those cases which, it is said by counsel, have been taken out," as, in his view of the case before him, it was not at all worth while to look into the authorities, and to determine whether those cases had been rightly decided or not. But if he meant to say that those cases had been actually taken out of the statute by judicial decisions, *we would ask what decisions or decision of any court of justice had at that time been made*, by which it was declared that the closing of the courts in time of war, was a good reply to the statute of limitations, except the cases of alien enemies, above mentioned? If no others can be found, then we are bound to presume he had reference to them.

It may be further observed, that the Chief Justice does not mention *war* at all. He speaks of the closing of the courts, but whether in consequence of war, or for some other cause, by an act of the legislature, he does not say.

Surely, an observation or expression of such doubtful meaning cannot be regarded as authority of much weight.

If we have misunderstood the authorities we have cited, there is yet another point upon which the defence in this case may be rested.

It is a very old and well-settled rule of law—as old, we believe, as the statutes of limitations, that "when they once begin to run,

no subsequent event will suspend their running, unless it be a case in which the legislature has declared there shall be such suspension." We, of course, do not trouble the court with authorities on this point.

Now, the cause of action in this case arose in 1860, and there was no obstruction of process until the 24th of May, 1861, as the evidence, or agreement filed in the case, makes manifest. There were then, as it must be conceded, even if the cause of action did not arise until the last day of December, nearly five months, during which the statute was running, and during which time the action might have been commenced, and process served, and perhaps judgment obtained; and if the court is to consider the cause of action as having arisen on the first day of January, 1860, or at some intermediate period between that time and the last day of December in that year, there appears to have been ample time to have sued and had a judgment and execution before the civil war broke out. Surely, then, there is no good reason why the statute should not be a bar to the action in this case.

If it were admitted that the pendency of civil war, or the obstruction of process, from the time when the cause of action arose until a certain time afterwards, so that no suit could have been commenced during that time, would have prevented the statute from running during that period, it would by no means follow that, if the statute had begun to run before the war began, it would not continue to run over the mesne obstacle, and in spite of the obstruction. This point does not appear to have been considered by the court, or even suggested by counsel, in the case of Hanger and Wallace.

We most respectfully submit, then, that unless your honors shall regard the case of Hanger and Wallace as overruling all the authorities above cited, the statute of limitations, upon which the defendant relies, would be a good defence, if there had been no further legislation on the subject; and secondly, if we are wrong in this, the act of Congress of the 11th of June, 1864, makes it a good defence.

CONWAY ROBINSON,

For HALYBURTON & ~~ROBINSON~~, *Jay Cov*

THE UNITED STATES
v.
WILY.
} *Addition to the brief for defendant.*

We have endeavored to show that *the general principle*, which *appears to us* to have been laid down in the case of Hanger *v.* Abbott, is not in harmony with the prior authorities; that is to say, we have attempted to maintain the proposition, that the mere obstruction of the service of process for any length of time; or the mere interruption of judicial proceedings by insurrection or civil war; or the mere fact that the courts may not be open for a long space of time; will not, of itself operate a suspension of acts of limitation.

There is, however, a point of view in which the decision of the court in Hanger *v.* Abbott would seem to be not in conflict with the former decisions of the courts, but supported by them. If it be true that, when one nation declares war or wages war against another, such declaration of war or the act of waging war is to be regarded and construed by the courts as a temporary repeal or suspension of *its own* statutes of limitation, so far as those statutes may affect creditors or other persons who are citizens of the country against which war is declared or waged, and who are not merely prevented by force from instituting legal proceedings, but who are prohibited from instituting such proceedings, by the nation with which they are at war, and whose *right to sue* is taken away by lawful authority; that is, by the nation with which they are at war; then it follows, that when the State of Arkansas, or the Southern Confederacy, of which that State formed a part, declared or levied war against the United States, she ought to be considered as having suspended, and having meant to suspend *her own* statutes of limitations, so far as they might have affected the citizens of New Hampshire, or of other States with which she was at war. Those statutes were suspended, not because process could not have been served, and alien enemies were unable to sue in her courts, but because, when the State of Arkansas declared war or levied war against New Hampshire and other States, that is, against the United States, it is a fair and reasonable and just presumption, that she meant to suspend her statutes of limitation, so far as the citizens of those States with which she was at war were concerned, as she had a perfect

right to do. The war ought to be considered as equivalent to a legislative declaration that those statutes should be suspended. See the cases of Jordan *v.* Jordan's adm'r, Wall *v.* Robson, and other cases cited in 1st Robinson's Prtice, 622, 623.

The State of Arkansas had certainly a right to suspend or repeal her own statutes; but neither the State, nor the State of Virginia, nor any other State of the Southern Confederacy, nor all of them together, could repeal or suspend or modify a statute of the United States. It requires an act of congress, or an act of the government of the United States, to do that and it is clear that neither congress nor the United States government has ever done anything which can be construed as a repeal or suspension of the statute upon which the defendant in this case relies, or as a suspension of *the right* of the United States to bring suit against him. They were prevented perhaps from instituting legal proceedings in the State of Virginia, by the state of the country, and the closure of the courts against them; but nothing was ever done by the government of the United States, or by congress, which was intended to take away, even for a moment, the right of the government to sue; and therefore nothing was ever done to suspend the running of the statutes of limitations against itself; and no other power could do so. It was never for an instant in the contemplation of congress to deprive the government of its *right to sue;* nor was it ever admitted at any time by the government, that *the right* did not exist; so that there is absolutely no ground upon which this action can be maintained by the United States, unless the courts can introduce into the statute of limitations an exception not contained in it—an exception founded upon the mere fact that the service of process was obstructed, and the usual course of judicial proceedings interrupted by the rebellion or *civil* war. This, we have endeavored to show, cannot be done, unless precedents are to be entirely disregarded; and cases are to be decided upon general reasoning alone, without any reference to what has been decided before.

~~CONWAY ROBINSON,~~
~~Bar~~ HALYBURTON & ~~ROBINSON~~.

Reynolds Taylor

Ostrichard refuses

Powers of Evelyn Sr & Privy
Sergeants f 330

1 Robinson vs Preston 1105 Fl. Cas

Ingall vs Swinburn f 18 H Sig.

J Taylor

April, 1871.

Supreme Court of the United States.

No. 133.

BRIEF FOR APPELLEES.

UNITED STATES OF AMERICA,
vs.
JOHN F. WILEY, and His Sureties. } *In Error*

To the Circuit Court of the United States for the District of Virginia.

CASE.

On the 15th of February, 1869, the United States commenced an action of debt in the Circuit Court at Richmond, on the Bond of John T. Wiley, late Marshal of the United States for the Eastern District of Virginia, and his sureties on said official Bond, to recover for the United States the sum of $14,367.66 advanced to him as Marshal and which it was alleged, he had failed to account for.

It is admitted on the Record that the cause of Action arose on the day of 1860.—Record, page 6.

It was also agreed that the defendants were actual residents of the State of Virginia from the 24th day of May, 1861, to the 24th day of May, 1865, and that during the

whole of that period, by reason of resistance to the execution of the laws of the United States, and the interruption of the ordinary course of judicial proceedings in said State of Virginia, said defendants could not be served with process for the commencement of said action.—Page 6.

The defendants pleaded the Statute of Limitation of six years in bar ~~&~~ payment and conditions performed, on which pleas issue was joined.

And, by consent, all matters arising in the issue joined upon the plea of Limitation were submitted to the Court —a jury being waived on that issue.

The Court deciding that the Statute of Limitations of six years, was a complete bar to the action and without passing upon the other pleas dismissed the suit.—Page 7.

The United States have sued out this writ to reverse this judgment, the sole question presented for decision by the Record being whether the United States is barred of its action by the plea of the Statute of Limitation of 6 years.

The Act of Congress of April 10th, 1806, section 4, see 2 Statutes at Large, 372, 1 Brightley's Digest, 597, section 10, reads as follows:

"*All* suits on Marshal's Bonds, if right of action has al-
"ready accrued, shall be commenced and presented 3 years
"after passage of act, and all such suits, in case the right
"of action shall accrue hereafter, shall be commenced and
"prosecuted within *six* years after the said right of action
"shall have accrued, and *not afterwards*, saving rights of
"infants from arrest, and persons *non compos*, so that they
"sue within 3 years after disabilities removed."

On the 11th June, 1864, (section 1, 13 Statutes at Large, p. 123—2 Brightley's Digest, p. 298) Congress passed the following act:

"Wherever during the existence of the present rebellion
"any action, civil or criminal, *shall accrue* against any
"person who by reason of resistance to the execution of the
"laws of the United States, or the interruption of the or-
"dinary course of Judicial proceedings, cannot be served
"with process for the commencement of such action or the
"arrest of such person; or, whenever after *such* action,
"*civil* or *criminal shall have* accrued, such person cannot

"by reason of such [illegible] resistance of the laws or "such interruption of Judicial proceedings be arrested or "served with process for the commencement of the action, "the *time* during which such person shall so be beyond "the reach of legal process *shall not be deemed or taken* "*as any part of the time limited by law for the com-* "*mencement of such action.*"

Congress had previously, on July 11th, 1862, 12 Stat. at Large, 538—Bradley's Digest, 362, enacted that the time fixed for limitation of suits against sureties of Postmasters by 3d section of act of Congress, March 3d, 1825 (2 years) shall not be considered as running in any State declared to be in a state of insurrection during the time the insurrection shall continue. And in the 16th section of Act of July 27th, 1868, 15 U. States Statutes at Large, page 197, which repealed the limitation of 2 years in suits against sureties of Postmasters, it was carefully provided that nothing therein contained should repeal any of the provisions of the Act of July 11th, 1862, aforesaid.

The above, it is believed, is a collection of all the Statutes of Limitations affecting offered bonds to which should perhaps be added the Act of March 2d, 1867, 14 Stat. at Large, p. 545, relating to Appeal and Writs of Error, as to which see 9 Wallace, p. 688.

Now on behalf of the Appellees, let it be noted—

1st. That the suit might have been commenced prior to the war.

2d That the suit was not brought for 3 years and 8 months after the 25th of May, 1865, when by the case agreed there was no longer any interruption to the regular proceedings of the courts of Virginia.

3d. That unless the four years, to-wit: from 25th of May, 1861 to 25th of May, 1865 are excluded in the computation of time, more than 8 years elapsed between the commencement of the action and the cause of action arose.

1st. Does the Act of 1806 herein cited bar the action?

It will not be denied, I presume, that the Act limiting suit on the Bonds of Marshals, which are payable to the United States of America, applies to all suits brought on such Bonds, whether for the use of the United States, or

for the use of any individual injured by the default of Marshal. The terms of the law are general "all suits," and whilst it is held that the Sovereign Power is not bound by general words in a statute but only when intended expressly or by necessary implication, no question of his character can be raised on a Statute applying exclusively to Statutary Bonds payable to the United States and saleable only in the name of the *United States.* It does not apply to the United States, the only obligee is the Bond mentioned in the act, the Statute is nugatory and of no effect whatever.

No such point was taken in the Court below. If the Act does apply, as I submit it does, then it is plain that by the literal terms of the act of 1806, the period of limitation of six years, had expired more than three years prior to the commencement of the action.

What then is the effect of the act of the 11th of June, 1864? Unless it be held that the statute is *retrospective* in its operations, this statute does not prevent the bar of the statute, for, if prospective only, its effects will be to stop the running of the statute from June 11th, 1864, to 25th May, 1865, a period less than a year, which would leave more than six years in which the statute would be held to run.

Now statutes of limitations are never held to be retrospective, for to make them so would be imparing vested rights, or the obligation of contracts.

Angell on Limitation, p. 14, sec. 22, and cases therein cited. Gospel Society *vs.* Wheeler—2 Gallison, p. 105,

Calder *vs.* Bull.—3 Dollas, 386.

Buck *vs.* Van Kleek.—7 Johnson, 12 Wheaton, 349 and 3 Peters, 280. Postmaster General *vs.* Rue, Gilpin's Reports, 554.

In this last case it was held that the act of March 3d, 1825, limiting suits against sureties of Deputy Postmasters did not apply to Bonds executed before the passage of the act.

The printed argument of my colleagues, pages 2 and 3 of their notes. render it unnecessary to say more on this point.

This Act of June 11, 1864, cannot be said to be an enabling statute, the obvious design and intent was to declare that the statute of limitations should not, in the cases mentioned, be computed in any part of this time limited by law for the commencement of an action, or which, in effect, is the same to add to the period limited by law, the exact time which that statute declared should not be computed.

In its provisions it differs materially from the act of March 2d, 1867, referred to in the case of the Protestor. 9 Wallace, 687.

It is submitted that the act of July, 11th, 1862, 12 Statute at Large, 538, and of July 27th, 1861, and of 11th June, 1864, all cited at large in this note are statutes declaratory of the principle that Legislation was necessary to prevent the running of the Statute of Limitation against *the United States* during the late civil war.

The Sovereign Power has made a law unto itself which can only be changed or repealed by the same power, to-wit: Congress.

Can the Judicial Department of the Government do more than construe these laws according to the letter by the same rules that other laws are construed?

How is the law written? Under the law as it was written, subject to such changes as the Legislative Power may rightfully make, was the Bond of Wiley executed by him and *his sureties. In hæc fadera venimus.* May they truly say, "when this Bond was executed peace reigned. Who could not have foreseen the desolating war of 4 years, which culminated in that terrible conflagration at Richmond, which consumed the records of Courts and the vouchers of public officers, and which has placed them at the mercy of the Government, when thus deprived of the proof of their disbursements.

Will it be excused by the Court if I shall say that such a misfortune has befallen the Appellee Wiley, in this case, or else, as always before, as may be fairly inferred from this record, to have been the case. Would this prevent claims of the Government for the last advances made to the late Marshall, have been settled by the production of his vouchers.

Surely the circumstances surrounding the dwellers in Richmond, and its vicinity during the war afford an additional reason, if one were needed, for holding statutes of limitation to be wise and just, and as statutes of repose, promotive of justice and preventive of wrong, injustice, and, in many cases, (as in this,) by protecting the parties from the consequences of loss of vouchers. All the modern decisions recognize the importance of adhering more rigidly to the letter and true meaning of the statutes of limitations. Angell on Limitations, p. 17.

The tendency of the courts at one time was to innovate upon the statutes by construction, which has often drawn forth from distinguished judges expression of regret, until now, at length, all courts, and no court more pointedly than this court, have settled that these statutes are wise and conclusive to the best interests of surety, and should be construed by the court rigidly according to the *letter* and true *meaning*, and that they are to be regarded favorably in all courts of justice.—Leffingwell *vs.* Warner, 2d Black, 616; 7 Wallace, 390.

In Bank of Alabama *vs.* Dalton, 9 Howard, 522, Justice Catron uses this language: "The Legislature having made no exception, courts of justice can make *none*, as this would be legislating."

And in McIvor *vs.* Ragan, 2d Wheaton, 29, Chief Justice Marshall said: "The rule is established beyond controversy that a court cannot add to the exceptions made in a statute of limitation, and that whenever the situation of a party was such as, in the opinion of the Legislature, to furnish a motion for excepting him from the operation of the law, the Legislature has made the exception, and it would be going far for this Court to add to these exceptions."

Such was the doctrine of the English courts. Soon after the first statute of limitation was enacted, 21st James 1st, which, as a cotemporaneous construction of the statute, is entitled to greater weight.

In the celebrated case of Benyon *vs.* Evelyn, decided by Sir Orlando Bridgman, when Chief Justice of the Common Pleas in 1664, and reported by him in a volume

entitled "Sir Orlando Bridgman's Judgment," for the first time printed in 1823, from the manuscripts collected by the late Mr. Hargrove, deposited in the British Museum.

Chief Justice Bridgman was one of the most eminent lawyers, about the period of the restoration of Charles 2d, and Fonblanque in the 2d volume of his treatise on equity page 172, note, has given his opinion of the value of these reports, of which Mr. Hargrave had left him the MSS. "As far exceeding Carter's account of them in copiousness, *depth* and *correctness*," and opinion which I am sure the Court will confirm upon an examination of them and especially of the case above cited.

This case was decided the year after the case of Predeaux *vs.* Webber, and preceded the other cases, cited by Justice Clifford in Hanger *vs.* Abbott, 6 Wallace, p. 540, and will not, I think, be obnoxious to the criticism made by him of those cases.

Of the correctness of the report of the case of Benyon *vs.* Evelyn, I think there can be no doubt. This was the leading case as to actions of debt, (and not Predeaux *vs.* Webber which, was an action of assault and battery) and an examination of it will show that the decision was not based upon the rule of law, that war annulled all debts between the subjects of the belligerents, to which no allusion whatever was made by the Judge in his judgment, nor was it a point involved in the case.

On the contrary, it will appear that the principle of the decision extended equally to actions of assault and battery, slander and debt.

It is to be regretted that the valuable and instructive case was not brought to the attention of the Court when Hanger *vs.* Abbott was argued.

I trust that I shall be pardoned for now bringing it to the attention of the Court, even at the risk of being considered prolix.

The case of Benyan *vs.* Evelyn is a noted and leading case on the question of Parliamentary privilege, besides being the fullest report of any case relating to the effect of civil war upon the Statute of Limitations.

Angell in his work on Limitations, says:

"There is a perfect coincidence between the views expressed by Courts, both English and American, and those expressed by Sir Orlando Bridgman in the case just cited, page 363. where it is said by him, "*Expedit reipublicae ut sit finis litium.*" And it is better to suffer a particular mischief than a general inconvenience, and such a one must happen if way is given to equitable construction against the letter of the act, which is, that they shall be sued within six years after cause of action. But it rests not there, but adds, "*and not after,*" (as in the act of 1866,) which negative words are the strongest words that can be in a law." "And so here (he adds) the negative words exclude all time for bringing the action, but that which the Statute doth expressly allow, for Statutes in the negative bind with common law, as it is said 10th E. 4 c. 7, and so a Statute of six years is a bar."

And let it be observed that this was the reply given by the Judge to the allegation that there was an impediment to the bringing of an action in, that there was no Court of the King nor seal since 1648, till his Majesty return.

Again, on page 358 the same Judge holds "that where cases are out of the words of the act of limitation, *as when the exception does not extend to any impediment by the* obstructions of justice, there ought not to be any constructions to bring them *within the equity of the act.*

And he shows that it was so held by Catlyn, Chief Justice, "no time shall be gained beyond the act," and so held by Dyes, Chief Justice, see page 359.

The syllabus of the case upon the plea of the Statute is, that when the lapse of time is a bar in the body of the Act of Limitation, (21 Jac. 1) and the proviso of exceptions reacheth only to cases of infants, *non compos mentis.* The imprisoned, or beyond seas are not to persons impeded by the obstructions of Justice, or otherwise the Court cannot enlarge the proviso so as to provide for the *casus omisus.*

This case is recognized in Lee *vs.* Rogers, 1 Levinz. 110, and 1 Salkeld, 420, and approved by Lord Chief Justice Holt, and the decison as to the court not being opened

was recognized in 19 Geo. 2, Lloyd *vs.* Vaughan, 2d Strange 1257, and in this country in 1805, in Jackson *vs.* Horton, 3 Caines' Reports, 201.

There have been Legislative enactments to remedy the difficulty created by allowing the Statute of Limitation to run during war and whilst the Courts were closed.

In England after the Revolution of 1688, there was the Act of W. & M., chap. 4, cited, 1 Robinson's New Practice, chap. 105, sec. 1, 623, and in this country during or after the War of the Revolution, Acts were passed by several of the States, as may be seen in the page last mentioned, and also in Higginson & Co. *vs.* Air & Co., 1 Dessauss 429, and Hudson *vs.* Cary 11 S. & R. 14.

So likewise there was provision on the subject in the treaty of peace between Great Britain and the United States in 1783; see Hopkirk *vs.* Bell, 3 Cranch 458. When it is seen how exception has thus been made by *Law*, it then appears that every part of the opinion of *Marshall*, C. J., in 1817, delivered in the case of McIvor *vs.* Rogan, 2 Wheaton, 29, before cited, is quite consistent with his position, and which same doctrine this Court in 1850, in the case reported in 9 Howard 522, (Bank of Alabama *vs*, Dalton, before cited) was maintained in Stowell *vs.* Zouch, and not departed from by the English Courts, even in cases of Civil War, when the Courts of Justice were closed and no suit could be brought.

And so as has been before referred to the Act of Congress of June 11th, 1864, is an express provision by *Law* to protect the United States in its future suits against the operation of its own Statute of Limitation during the remaining period of the war after its passage. and affirming the principle that it did run on against the Government, at least excludes any and all other relief and protection against the running of the Statute during the war than that provided by itself and for itself, the *Sovereign* by that Act. It had the power to have made a more liberal provision of time for itself, but not deeming it expedient or necessary, it is not for the Courts to supply what was wanting in Legislation to cover the exergencies of this case

upon any supposed equity of the Statute to prevent a defeat of this action upon this plea.

It is submitted that the *principle of equity* of a Statute, at all times questionable, cannot be applied to a Statute of the United States in favor of the Power enacting the Statute for it may fairly be presumed that as it was in the power of the U. S. to embrace in the words of the Act all the provisions which it deemed *equitable* for itself, thereby obviating the necessity of enlarging the Statute by construction to meet any equity not within the letter of the law, that it has declared in express terms the whole legislative will in regard to the subject embraced by the Act. The maxim, '*Expressio unius*" plainly excludes the application of the principle, at least to a case, between the United States and one of its own citizens.

And it is difficult to see what principle of equity could be invoked here. For if Congress had not thought proper to create specially against the United States, the *bar* of the Statute of Limitation no time would have been run against the United States, so that outside of the special Statute, there being no bar there can be nothing referable to equity to be invoked in its behalf. It has made its own law for itself, which the Courts can no more change than it could change its contracts to promote the supposed justice of the case, because the Government had omitted in the contracts a provision which the Court might deem equitable and just.

It is submitted that the recent decisions of the Court, viz: In Hanger and Abbott, 6 Wallace, 532, and the Protector, 9 Wallace, 688, and other like cases decided this term and not yet reported, have no application to the case at bar.

All of those cases were cases between individual subjects or citizens of opposing belligerents.

They are decided upon the avowed principle of the law of nations, which has established that war when duly declared or recognized as such by the war making power, imparts a prohibition to the subject or citizens of all commercial and other intercourse with citizens or persons domiciled in the enemy's country.

The law of war, binding both of the belligerents, deprives the citizens of both countries of the right to sue, making it illegal as well as impossible, and thus by act of law, suspends the remedy, and consequently the laws of limitation.

But surely the United States, will not be willing to admit for the purposes of this case that the late so-called rebellion, whilst it deprived it of the capacity or power to sue, because of the occupation of Virginia by the Confederate armies, that it was also deprived of its right to sue and that it would have been illegal.

Justice Clifford in Hanger *vs.* Abbott, states, p. 542, that the right to sue was suspended by the acts of the Government for which all the citizens are responsible, but this only refers to the right of the *citizen*, not to the right of the Government.

That right, if suspended, was suspended by the intervention of the Confederate army, which was not subdued until 1865, and this court will not be asked to declare that any right of the U. S. Government was suspended by the so-called Rebel Army,however it may have been interrupted in the exercise of that right. The distinction is too obvious it is hoped to need further remark.

The United States had the power to protect itself against the statute of Limitation which it had prescribed for itself by its own Legislations, and the simple question for the Court to decide is whether it has done so.

I respectfully submit that it has not, and that the judgment rendered in this cause by Chief Justice Chase should be affirmed

Whilst relying on the notes presented by my colleagues I trust the novelty of this case and its importance to the appellees, will excuse, if not justify the additional note now presented by me.

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